# IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

RICHARD A. McCLOSKEY,	)
Petitioner,	)
v.	) ) C.A. No. 6061-ML
JOHN A. McCLOSKEY, personally and	) C.A. No. 0001-WIL
as Executor of The Estate of Edward  McCloskey, THE ESTATE OF EDWARD	)
McCLOSKEY, and JOSEPHINE GILLESPIE, (as beneficiary and nominal Respondent),	)
	)
Respondents.	)

# MASTER'S REPORT (Post-Trial)

Date Submitted: January 15, 2014 Final Report: April 24, 2014

David J. Weidman, Esquire, of SERGOVIC, CARMEAN & WEIDMAN, P.A., Georgetown, Delaware; Attorneys for Petitioner.

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LEGROW, Master

At its most basic, this case provides an interesting study in how spite, particularly when combined with jealousy, may drive a person to seek irrational ends, without regard for the carnage that may occur, and without any apparent realization that, even if he is successful, the spite will not be quelled. The parties to this action would have been better served spending their time and money on a therapist's couch, rather than in a courtroom. Having eschewed that more rational course, the parties, and particularly the respondent, instead chose to spend five trial days recounting decades of family drama and discord, down to the irrelevant minutia of the petitioner's sportsmanship on the basketball court.

The length of trial and the number of witnesses belie the relatively simple issue presented in this case: whether the parties' deceased father made a valid and enforceable oral agreement to make a will leaving certain property to the petitioner. Although the burden under Delaware law to prove the existence of an oral contract to make a will is substantial, the petitioner met this burden. Determined to deny his brother the property promised to him, the respondent continues to press his case, recycling the same unconvincing evidence and relying almost exclusively on his own testimony, which lacked credibility. The petitioner demonstrated by clear and convincing evidence that his father promised to leave him the family home and surrounding property in exchange for the petitioner's agreement to live in the home, improve and repair it, and care for his grandfather and father in their twilight years. Having carried that burden, the petitioner is entitled to specific performance of the contract. For the reasons that follow, I recommend that the Court enter an order requiring the father's estate to convey title to the property to petitioner. This is my final post-trial report.

#### FACTUAL BACKGROUND

These are the facts as I find them after trial.

## A. Family Background

The Decedent, Edward McCloskey ("Edward"), was the father of five children. His oldest son, Richard McCloskey ("Richard"), is the petitioner in this action, while his youngest son, John McCloskey ("John") is named as a respondent in this action in his personal capacity and in his capacity as executor of Edward's estate (the "Estate"). Edward's three other children are Josephine Gillespie ("Josephine"), Ronald McCloskey ("Ronnie"), and Robert McCloskey ("Robert").

Edward was married only one time, to Mary McCloskey ("Mary"), from whom he divorced in 1963. Richard and his wife, Wanda McCloskey ("Wanda"), have two children: Rusty and Randy. John is married to Linda McCloskey ("Linda"). Most of the members of the McCloskey family are involved in farming in various capacities.

## **B.** The Property

This case involves a dispute about the ownership of Edward's home and surrounding property at 957 Midstate Road in Felton, Delaware (the "Property"). In addition to a single-family home, the Property consists of approximately 48 acres of land and some farm buildings. All of Edward and Mary's children were born in the house. In 1973, John built a home next to the Property on land given to him by Edward.

<sup>&</sup>lt;sup>1</sup> Because most of the parties and witnesses share the same last name, I use first names for the sake of clarity and consistency. No disrespect is intended.

Richard married Wanda in 1959, shortly after graduating from high school, and the couple moved in to a new trailer Richard purchased. When Edward and Mary divorced in 1963, Edward remained in the Property with his elderly father, Jerry McCloskey ("Jerry"). The divorce, and the manner in which Edward ejected Mary from the Property, caused a division among the McCloskey children, with Richard taking Edward's side and the four remaining children siding with Mary.<sup>2</sup>

# C. Richard Moves into the Property

Shortly after the confrontation during which Edward kicked Mary out of the Property, Edward asked Richard and Wanda to move into the Property to help Edward take care of the home and Edward's father, Jerry, who was 77 years old.<sup>3</sup> The testimony is undisputed that neither Edward nor Jerry showed an interest in performing the daily chores associated with keeping a home, including cooking, cleaning, or laundry. Jerry also required additional care as he aged.<sup>4</sup> Although Richard and Wanda had a home, they agreed to move in with Edward and Jerry to provide assistance. Richard and Wanda did not pay rent, but, in addition to her full-time job, Wanda performed all the necessary domestic chores, and Richard and Wanda bought the food for the household.<sup>5</sup> Beginning around 1975, Richard and Wanda also paid the utilities in the home.<sup>6</sup>

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<sup>&</sup>lt;sup>2</sup> McCloskey v. McCloskey, C.A. No. 6061-ML (April 22-25, 2013, June 24, 2013) (TRIAL TRANSCRIPT) (hereinafter "Trial Tr.") 164-65 (Richard), 761-66 (John).

<sup>&</sup>lt;sup>3</sup> Trial Tr. at 36-39 (Richard), 337-38 (Wanda)

<sup>&</sup>lt;sup>4</sup> *Id.* at 339, 475 (Wanda).

<sup>&</sup>lt;sup>5</sup> *Id.* at 40 (Richard), 338-39 (Wanda)

<sup>&</sup>lt;sup>6</sup> Id. at 42 (Richard), 420 (Wanda); PX 31.

The home was in disrepair when Richard and Wanda moved into it. Although Edward had money, he did not spend his money to maintain or improve his house. Shortly after they moved in, Richard and Wanda began discussing with Edward various repairs or improvements that were necessary or desirable. Richard and Wanda credibly and consistently testified that on each occasion, Edward instructed Richard and Wanda that they should pay the associated costs because the Property would belong to Richard when Edward died. Wanda's brother, Chuck Holliday, overheard Edward promise Richard the property on two occasions in the 1960s when Richard asked Edward about building a barn on the Property.

Over the next ten years, Richard and Wanda paid the costs associated with closing in the front porch, adding a downstairs bathroom, replacing the roof, adding a cement patio, installing siding, replacing all the upstairs windows and installing a French drain, along with substantial electrical work and the addition of electric heat upstairs and downstairs. Richard and Wanda retained many of the receipts associated with these expenses, and Wanda also contemporaneously maintained a record of the repairs and improvements and the associated costs. 10

#### **D.** The 1977 Will

Edward executed his first will in 1977 (the "1977 Will"). At Edward's request, Richard made an appointment with a local attorney, who drew up the will. The 1977

<sup>&</sup>lt;sup>7</sup> Trial Tr. at 46 (Richard), 340-41 (Wanda); PX 23.

<sup>&</sup>lt;sup>8</sup> Trial Tr. at 444-45, 462 (Holliday).

<sup>&</sup>lt;sup>9</sup> *Id.* at 45 (Richard); 340-48 (Wanda); PX 23-25.

<sup>&</sup>lt;sup>10</sup> Trial Tr. at 340-48 (Wanda); PX 23-26.

Will left the Property to Richard in fee simple absolute, devised a separate farm (the "Turner Farm") to John, and divided the residue of Edward's Estate between Ronnie, Josephine, Robert, and John. 11 The 1977 Will named Richard and John as co-executors. Richard was aware of the contents of the 1977 Will because he sat in on Edward's meeting with the attorney. After the meeting, Richard informed John of the bequests Edward made in the will, particularly those involving the two farms. 12

During this period, John worked for Richard in his various farming operations, and John generally was dissatisfied with the pay and treatment he received from Richard, particularly Richard's refusal to grant him vacation at certain times. <sup>13</sup> Around 1980, John quit working for Richard. 14

Beginning in the mid-1970s, Jerry's mental faculties began to decline significantly, and he required additional care and monitoring, which Richard and Wanda undertook.<sup>15</sup> Jerry passed away in 1981. After Jerry's death, Edward asked Richard and Wanda to continue living in the Property and assisting Edward. 16 Although Richard and Wanda owned a separate home, and could have moved out of the Property, they acceded to Edward's request and remained there to care for him and for the Property. Over the next decade, Richard and Wanda continued to pay for repairs and improvements to the Property, always with Edward's permission and always with his instruction that they

<sup>&</sup>lt;sup>11</sup> JX 1.

<sup>&</sup>lt;sup>12</sup> Trial Tr. at 66-67 (Richard), 641-43 (John).

<sup>&</sup>lt;sup>13</sup> *Id.* at 622-28 (John). <sup>14</sup> *Id.* at 628 (John).

<sup>&</sup>lt;sup>15</sup> *Id.* at 73-74 (Richard), 351-53 (Wanda).

<sup>&</sup>lt;sup>16</sup> *Id.* at 75-76 (Richard), 355-56 (Wanda), 646 (John).

should bear the costs because the Property would belong to Richard when Edward died.<sup>17</sup> The repairs and improvements included, among other things, installing a new ceiling in the dining room, remodeling an upstairs bathroom and bedroom, installing central air upstairs, and repairing the roof.<sup>18</sup>

#### E. The 1991 Codicil

In 1991, Edward executed a codicil to his 1977 Will (the "1991 Codicil"). The 1991 Codicil reaffirmed Edward's promise to leave the Property to Richard, and also named Wanda, Rusty, and Randy as contingent beneficiaries of the bequest in the event Richard predeceased Edward. As in the 1977 Will, Edward devised the Turner Farm to John, and in the 1991 Codicil named John's wife and children as contingent beneficiaries of that bequest. The primary revision to the 1977 Will was the removal of John as a residuary beneficiary of Edward's Estate; the 1991 Codicil provided that the residue of the Estate would be divided between Ronnie, Robert, and Josephine.

In the mid-1990s, Richard and Wanda observed some changes in Edward's personality and mental acumen. For example, he became confused at times, and on one notable occasion started a rototiller on a stone driveway.<sup>20</sup> Edward also began to exhibit some resentment or hostility toward Wanda, possibly stemming from an incident in which he mistook Wanda for his wife and tried to kiss her.<sup>21</sup> The trial record included a note dated April 25, 1997 and handwritten by Edward. In the note, Edward recorded that

<sup>&</sup>lt;sup>17</sup> *Id.* at 46 (Richard), 340-41 (Wanda).

<sup>&</sup>lt;sup>18</sup> PX 24.

<sup>&</sup>lt;sup>19</sup> JX 2.

<sup>&</sup>lt;sup>20</sup> Trial Tr. at 82-83 (Richard).

<sup>&</sup>lt;sup>21</sup> *Id.* at 83-84 (Richard), 366-68 (Wanda).

Wanda had yelled at him around 5:15 that evening.<sup>22</sup> This note is consistent with testimony at trial describing Edward's behavior as increasingly angry and somewhat paranoid by this period of his life.

Richard and Wanda, however, continued to reside with Edward and provided him care. During this period, Richard and Wanda also paid for improvements and repairs to the Property, including renovating the kitchen, installing an irrigation system and barn on the land, and installing a new roof.<sup>23</sup>

#### **F.** The 1997 Will

Shortly after he wrote the April 25, 1997 note, Edward began discussing with John changes to Edward's will, which John memorialized in notes dated in May 1997. Two months later, Edward signed a will (the "1997 Will") that left Richard only a life estate in the Property, with the remainder interest passing in equal shares to Ronnie, Josephine, Robert, and John. Richard's life estate included only the home and some surrounding land, but the farm land on the Property passed directly to Edward's other four children. Unlike the 1991 Codicil, which named Ronnie, Josephine, and Robert as beneficiaries of the residue of the Estate, John reappeared as a residuary beneficiary in the 1997 Will, in addition to receiving the Turner Farm. The 1997 Will named John as the sole executor of Edward's Estate.

<sup>&</sup>lt;sup>22</sup> RX 33.

<sup>&</sup>lt;sup>23</sup> PX 24.

<sup>&</sup>lt;sup>24</sup> RX 38

<sup>&</sup>lt;sup>25</sup> JX 3.

<sup>&</sup>lt;sup>26</sup> *Id*.

Unlike Edward's previous wills, Richard was not aware of the changes in Edward's estate plan. In fact, John and Edward actively concealed the 1997 Will from Richard. Correspondence and communications from the attorney drafting the will were directed to John's house, rather than to Edward's house.<sup>27</sup> John took Edward to the attorney's office and neither Edward nor John informed Richard of the changes.<sup>28</sup> When John asked Edward why he had reduced Richard's inheritance, Edward responded that he did not want Wanda to receive anything from his Estate.<sup>29</sup>

#### G. John Takes Control of Edward's Funds

Beginning in the late 1990s, John increasingly became involved with Edward's financial and medical affairs. John had his name added to Edward's bank account, directed the bank to mail Edward's bank statements to John's home, began insisting on controlling and monitoring Edward's medications, and drove Edward to all his medical appointments.<sup>30</sup> John testified he was concerned about Edward's finances and believed Richard and Wanda were not properly monitoring Edward's health and his medications.

Several witnesses, including Josephine's husband, credibly testified that John was extremely controlling of Edward's funds. He did not provide any money to Richard or Wanda for Edward's daily needs or care, and repeatedly refused Edward's own requests for access to his money.<sup>31</sup> When Edward directed the bank to send statements to the

<sup>&</sup>lt;sup>27</sup> RX 38.

<sup>&</sup>lt;sup>28</sup> Trial Tr. at 872, 948 (John).

<sup>&</sup>lt;sup>29</sup> *Id.* at 659 (John).

<sup>&</sup>lt;sup>30</sup> *Id.* at 123-27 (Richard), 379 (Wanda), 683-87, 713-14, 949-50 (John).

<sup>&</sup>lt;sup>31</sup> *Id.* at 450 (Holliday), 565 (Jordan), 708-09 (John); PX 32 at 11, 22-23 (Deposition of Sam Gillespie, Josephine's husband).

Property, rather than to John's address, John again overrode that decision and directed the bank to send the statements to John's house.<sup>32</sup>

Between 1996 and 2001, Edward experienced at least three strokes and underwent knee surgery and prostate surgery. His health declined substantially, to the point that he no longer could sleep upstairs by 2001, had to be reminded to brush his teeth, needed assistance bathing and dressing, and generally required more extensive care.<sup>33</sup> He also began talking to himself regularly.<sup>34</sup> In April 2000, John and his wife, Linda, prepared a list of "grievances" that Edward purportedly had with Richard. 35 According to John's testimony, Edward sat for two or three hours reciting various details about, among other things, cash he gave Richard for various repairs or improvements around the house, occasions in which Edward assisted Richard financially with the purchase of farm equipment, money he gave Richard or Wanda over the years toward household expenses, and instances in which Richard sold Edward's farm equipment and kept the proceeds of the sale. John testified he took notes of the conversation "so the rest of the family would know down the road."<sup>36</sup> Linda took John's notes approximately a month later and organized them into a type-written document that Edward signed and dated (the "April 2000 Document"). John made additions and edits to the list and prompted Edward to discuss several of the topics.<sup>37</sup>

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<sup>&</sup>lt;sup>32</sup> Trial Tr. at 123-24 (Richard), 949-50 (John).

<sup>&</sup>lt;sup>33</sup> *Id.* at 118-22 (Richard), 337, 501 (Wanda) 664, 685-86 (John).

<sup>&</sup>lt;sup>34</sup> *Id.* at 504-05 (Wanda).

<sup>&</sup>lt;sup>35</sup> JX 21.

<sup>&</sup>lt;sup>36</sup> Trial Tr. at 682-83 (John).

<sup>&</sup>lt;sup>37</sup> *Id.* at 671-76 (John).

By 2003, the parties agree Edward could not live alone.<sup>38</sup> He required substantial care and attention to his daily needs, was taking Exelon for dementia as well as medication for diabetes, and began exhibiting unusual behavior, including making inappropriate sexual comments to his two young great-granddaughters.<sup>39</sup> John asked Edward to move in with John and Linda on several occasions, but Edward consistently refused that offer, choosing instead to remain in his home.<sup>40</sup> Edward never asked Richard or Wanda to leave the property.<sup>41</sup>

#### H. The 2003 Will

In May 2003, John contacted another attorney, purportedly at Edward's request, to again revise Edward's testamentary plan. John drove Edward to the meeting with the attorney, participated in the meeting, and specifically instructed the attorney not to send any correspondence to Edward or to call Edward at home. The intake sheet filled out by the attorney only lists John's name and address in the billing field, and include instructions stating "DO NOT CALL EDWARD AT HOME[.] DO NOT SEND MAIL TO EDWARD[.]"

In June 2003, Edward signed his last will (the "2003 Will"). The 2003 Will devised the Property to John and Josephine, except that Richard was given a right to reside on the Property for one year after Edward's death. John was given the Turner Farm in fee simple, and John and Josephine were the residuary beneficiaries of the

<sup>&</sup>lt;sup>38</sup> *Id.* at 692 (John).

<sup>&</sup>lt;sup>39</sup> *Id.* at 132-35 (Richard), 506-514 (Wanda), 692 (John).

<sup>&</sup>lt;sup>40</sup> *Id.* at 706 (John).

<sup>&</sup>lt;sup>41</sup> *Id.* at 667-68 (John).

<sup>&</sup>lt;sup>42</sup> JX 4 (emphasis in original).

Estate. <sup>43</sup> If either Josephine or John predeceased Edward, their respective share of the Estate, including their interest in the Property, was devised to Linda or her issue. <sup>44</sup> John was named as the sole executor of the Estate. In keeping with the instructions John gave the drafting attorney, no one informed Richard of the 2003 Will. Notably, John testified that he did not tell Richard or Wanda about the 2003 Will or its contents because he knew "[i]t would cause big conflicts between Richard, Wanda, and Ed." During this period, Edward, who witnesses consistently described as frugal and someone comforted by watching his savings accumulate, gave John and Josephine \$70,000 each in certificates of deposit. <sup>46</sup> John did not tell any of his siblings about this gift. <sup>47</sup>

Between 2001 and 2004, Richard's daughter-in-law, Jordan, spent several nights a week at the Property, and also was present regularly during the day while she completed her education and worked a part-time job.<sup>48</sup> Jordan observed Edward talking to himself and yelling to himself almost daily during this period.<sup>49</sup> Jordan also heard Edward and Richard discussing improvements and repairs to the Property at various times, and recalls hearing Edward telling Richard to pay for the improvements because the Property would be Richard's "anyway."<sup>50</sup> During this period, the repairs and improvements to the house

<sup>&</sup>lt;sup>43</sup> JX 5.

 $<sup>^{44}</sup>$  *Id* 

<sup>&</sup>lt;sup>45</sup> Trial Tr. at 696 (John).

<sup>&</sup>lt;sup>46</sup> *Id.* at 706-07, 716-17 (John).

<sup>&</sup>lt;sup>47</sup> *Id.* at 707 (John).

<sup>&</sup>lt;sup>48</sup> *Id.* at 544-45, 580-81 (Jordan).

<sup>&</sup>lt;sup>49</sup> *Id.* at 545-46 (Jordan).

<sup>&</sup>lt;sup>50</sup> *Id.* at 548-50, 581-83 (Jordan).

included installation of electric heat in the kitchen and office, painting the barn roofs, and replacing a door and damaged flooring.

#### I. The 2008 Deed

By November 2005, Edward had been diagnosed with Alzheimer's Dementia, and his physician opined that he was "not competent to manage his own financial and medical affairs and ha[d] not been since January 2005."51 In a mini-mental state examination ("MMSE") administered in July 2005, Edward scored 15/30, a score indicating he had "moderate" cognitive impairment. 52 John was aware of this diagnosis – in fact, he testified that he asked Edward's doctor to perform a competency test and issue this letter because he did not trust Richard and Wanda.<sup>53</sup> Edward declined further in 2006 after suffering a major stroke and Bell's Palsy.<sup>54</sup> After the stroke, Edward was incontinent, wheelchair bound, and required significant care. He continued to live in his home and Richard and Wanda provided the majority of his daily care. 55 John testified that his father's care never was neglected.<sup>56</sup>

Although he was aware that Edward was suffering from dementia and his doctor had opined that he was unable to handle his financial and medical affairs, John nevertheless asked a lawyer to draft a deed for Edward's signature, conveying three acres

<sup>&</sup>lt;sup>51</sup> RX 40.

<sup>&</sup>lt;sup>52</sup> *Id*.

 <sup>53</sup> *Id.*; Trial Tr. at 823 (John).
 54 Trial. Tr. at 137-42 (Richard).

<sup>&</sup>lt;sup>55</sup> *Id.* at 722 (John).

<sup>&</sup>lt;sup>56</sup> *Id.* at 737-38 (John).

of the Property to John for no consideration (the "2008 Deed"). 57 John testified Edward promised him these three acres years before, but John did not at the time have the funds to make use of the acreage, which is adjacent to John's home.<sup>58</sup> John did not tell the attorney who drafted the deed that Edward had been adjudged incompetent by his physician.<sup>59</sup> He instead instructed his father to sign the deed, and did not tell any of his siblings about the transfer.<sup>60</sup>

#### J. Edward's Death and the Fallout

At some point between 2007 and 2010, Edward gave John a handwritten note that appeared to instruct John to obtain a copy of the 1977 Will. The note further stated "Check to Leave House to Richard." John conceded that this notation was indicative of Edward's intent to leave the Property to Richard. 63 John apparently took no action with respect to the note and did not show it to Richard until discovery was conducted in this case.64

Edward's decline continued in the waning years of his life, and he passed away on September 1, 2010. After Edward's death, John mailed a copy of the 2003 Will to Richard, who was shocked by its contents.

 <sup>57</sup> *Id.* at 729-33 (John); PX 28.
 58 PX 28-29; Trial Tr. at 730 (John).

<sup>&</sup>lt;sup>59</sup> Trial Tr. at 732-33 (John).

<sup>&</sup>lt;sup>60</sup> *Id.* at 731-33 (John).

<sup>&</sup>lt;sup>61</sup> *Id.* at 749-50 (John); PX 30.

<sup>&</sup>lt;sup>62</sup> PX 30.

<sup>&</sup>lt;sup>63</sup> Trial Tr. at 750-51 (John).

<sup>&</sup>lt;sup>64</sup> *Id.* at 751-52( John).

## K. Procedural Background

Richard filed this action against John, Josephine,<sup>65</sup> and the Estate (collectively, the "Respondents") on December 10, 2010. In his amended petition, dated February 17, 2011, Richard sought rescission of the 2008 Deed and specific performance of Edward's promise to leave Richard the Property.<sup>66</sup> The Amended Petition contained a number of other counts, including a claim that the 2003 Will was not valid because Edward lacked testamentary capacity or was unduly influenced to make the will,<sup>67</sup> and claims for a constructive or resulting trust over the Property.

This case was tried over the course of five days. In addition to the parties, several other witnesses testified, including Wanda, Jordan, William Arrington, Chuck Holliday, Linda, Ronnie, Mary, and Pauline McCloskey. From the outset, it was apparent that John had adopted an overly literal interpretation of one of William Shakespeare's most famous monologues, and viewed these proceedings as something of a performance piece: John opened his testimony by "welcoming" the audience and asking to make his "opening statement," and at what he apparently viewed as a critical juncture stopped the

<sup>&</sup>lt;sup>65</sup> Josephine did not actively participate in the litigation or contest Richard's right to specific performance of the oral agreement or any other relief.

Amended Petition to Review Proof of Will, to Specifically Enforce Promise to Make a Testamentary Devise, to Impose Constructive or Resulting Trust, and to Rescind Deeds (hereinafter "Amended Petition") ¶¶ 31-37, 46-51.

Although the Amended Petition referred only to the 2003 Will, the Pre-Trial Stipulation and Order included a claim to declare the 1997 Will invalid for lack of testamentary capacity or undue influence. *See* Pre-Trial Stipulation and Order dated Jan. 9, 2013 (hereinafter "Pre-Trial Order"), at 1-2, 7, 11.

<sup>&</sup>lt;sup>68</sup> William Shakespeare, <u>As You Like It</u> Act 2, Sc.7 ("All the world's a stage, [a]nd all the men and women merely players ....").

proceedings to make sure the audience could hear him.<sup>69</sup> What became clear over the course of trial is that John viewed the case as a referendum on Richard's behavior and treatment of John over the course of many years, and an opportunity to satisfy the resentment and dislike that even John's mother acknowledged John felt toward Richard.<sup>70</sup>

Perhaps for that reason, John's trial testimony was not credible on many critical points and often differed markedly from his earlier deposition testimony. For example, John initially testified at trial that Richard did not tell him in 1977 how Edward had devised the two farms, but John was forced to change his testimony when confronted with his contrary statements at his deposition.<sup>71</sup> Similarly, John testified at trial that he and Edward did not discuss Edward's plans for the 1997 Will before they drove to the lawyer's office, but that testimony is contradicted by John's handwritten notes dated May 9, 1997 and May 11, 1997, in which John appeared to draft or record ideas regarding Edward's division of his assets. 72 John's testimony regarding the meaning of these notes, particularly his contention that the "I" in these notes referred to John and not Edward, also was nonsensical and suggested a desire to elide the true nature of his involvement with the 1997 Will.<sup>73</sup> John further denied at trial that he had asked his father to add John's name to Edward's bank accounts, and that he had suggested to his father how to divide the certificates of deposit Edward gave John and Josephine in 2003, but John later was forced to backtrack and acknowledge his admissions to the contrary at his

<sup>&</sup>lt;sup>69</sup> Trial Tr. at 611, 628-29 (John).

<sup>&</sup>lt;sup>70</sup> *Id.* at 815-17 (Mary).

<sup>&</sup>lt;sup>71</sup> *Id.* at 641-43 (John).

<sup>&</sup>lt;sup>72</sup> *Id.* at 942-44 (John).

<sup>&</sup>lt;sup>73</sup> See id.: RX 38.

deposition.<sup>74</sup> Finally, John initially denied during trial ever seeing his father's safe open, but the following day testified that he saw the safe open.<sup>75</sup> John claimed confusion regarding those contradictions. <sup>76</sup> As a result of these, and other, inconsistencies, along with John's palpable desire to use this litigation to mar Richard's image, it is difficult to place much, if any, weight on John's self-serving testimony.

After the conclusion of trial and post-trial briefing, I issued a draft report from the bench recommending that the Court find that Richard was entitled to specific performance of Edward's oral agreement to make a will leaving the Property to Richard in fee simple. I also recommended that the Court enter an order rescinding the 2008 Deed, both because Edward was barred from conveying part of the Property to John in light of the oral agreement, and because Edward lacked capacity to transfer the property Having concluded that Richard was entitled to specific performance and in 2008. rescission of the deed, I did not reach Richard's alternative claims to invalidate the 2003 Will and the 1997 Will, along with his claims for a constructive trust or a resulting trust. John filed timely exceptions to my draft report and the parties submitted additional limited briefing addressing those exceptions.

#### LEGAL ANALYSIS

The parties' collective family history involves a number of complicated and deepseated family resentments. Other than providing some background regarding what transpired, and illuminating some of the parties' motivations, that history largely is

<sup>&</sup>lt;sup>74</sup> *Id.* at 713-717 (John). <sup>75</sup> *Id.* at 793, 828-29 (John).

<sup>&</sup>lt;sup>76</sup> *Id.* at 741-42 (John).

irrelevant. The parties, and especially John, nonetheless spent a great deal of time at trial recounting various family incidents, particularly those surrounding the childrens' upbringing and their parents' divorce. What is clear is that all of the members of the family have very emotional and engrained beliefs regarding who is to blame for the deterioration of the siblings' relationship. It is not necessary to resolve what actually happened 40 or 50 years ago. As previously indicated, and despite the lengthy presentation of evidence, this case is relatively simple to resolve.

Although Delaware recognizes the validity and enforceability of an oral contract to make a will, the law views those agreements with skepticism.<sup>77</sup> A will executed with the formalities of the law is treated with great dignity, and the Court will not lightly deviate from the terms of such a will.<sup>78</sup> For that reason, a party seeking to specifically enforce an oral agreement to make a will must meet a heightened burden of proof. This Court scrutinizes such applications closely, requiring the party alleging the existence of the agreement to prove both the creation of the contract and its terms by clear and convincing evidence.<sup>79</sup> To meet this standard, the evidence presented must "produce in the mind of the trier of fact an abiding conviction that the truth of the factual contentions is highly probable, reasonably certain, and free from serious doubt."<sup>80</sup> That elevated burden of proof is necessary because the testator never will be able to present his version

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<sup>&</sup>lt;sup>77</sup> Shepherd v. Mazzetti, 545 A.2d 621, 623 (Del. 1988); Eaton v. Eaton, 2005 WL 3529110, at \*3 (Del. Ch. Dec. 19, 2005).

<sup>&</sup>lt;sup>78</sup> Shepherd, 545 A.2d at 623; Boush v. Hodges, 1996 WL 652762, at \*6 (Del. Ch. Nov. 6, 1996).

<sup>&</sup>lt;sup>79</sup> Brown v. Wiltbank, II, 2011 WL 5027057, at \*5 (Del. Ch. Oct. 13, 2011); In re Maull, 1994 WL 34302, at \*3 (Del. Ch. Jun. 9, 1994).

<sup>&</sup>lt;sup>80</sup> Brown, 2011 WL 5027057, at \*6 (internal quotations omitted).

of events, creating an increased risk of fabrication.<sup>81</sup> In order to obtain the relief he seeks, Richard must establish: (1) the existence of an oral agreement, (2) the material terms of that agreement, (3) that he partially performed in reliance on Edward's promise, suggesting a *quid pro quo* exchange, and (4) that it would be inequitable to deny him the benefit of his bargain.<sup>82</sup>

In order to establish the existence of an oral agreement, Richard must prove by clear and convincing evidence each of the essential elements to a contract:

(1) a promise on the part of one party to act or refrain from acting in a given way; (2) offered to another, in a manner in which a reasonable observer would conclude the first party intended to be bound by acceptance, in exchange for; (3) some consideration flowing to the first party or to another, (4) which is unconditionally accepted by the second party in the terms of the offer, which may include (a) a verbal act of acceptance; and (b) performance of the sought after act. <sup>83</sup>

A promise is "a manifestation of intention to act ... in a specific way so made as to justify ... [an] understanding that a commitment has been made." The credible testimony offered by Richard, Wanda, Jordan, and Chuck Holliday consistently established Edward's repeated promise to leave the Property to Richard in exchange for Richard's commitment to pay for the repairs and improvements to the Property. Although Richard and Wanda are interested in the outcome of this case, neither Jordan nor Chuck will receive any benefit if Richard prevails, and I cannot conclude that their familial relationship with Richard and Wanda is sufficiently strong to prompt perjury. Having

<sup>&</sup>lt;sup>81</sup> Hughes v. Frank, 1995 WL 632018, at \*2 n.2 (Del. Ch. Oct. 20, 1995).

<sup>82</sup> Brown, 2011 WL 5027057, at \*6; Hughes, 1995 WL 632018, at \*3.

<sup>83</sup> *Hughes*, 1995 WL 632018, at \*3.

<sup>&</sup>lt;sup>84</sup> *Id.* at \*3 (quoting *Hunter v. Diocese of Wilmington*, 1987 WL 15555, at \*2 (Del. Ch. Aug. 4, 1987)) (internal quotations omitted).

had the opportunity to observe all four witnesses, I found them to be forthright, in marked contrast to the testimony offered by John.

Although their testimony alone might not amount to clear and convincing evidence of Edward's promise, the witnesses' version of events is buttressed by the direct evidence of the 1977 Will and the 1991 Codicil, both of which were contemporaneously provided to Richard. Edward's act of giving Richard copies of these testamentary documents confirmed his promise to give the Property to Richard and made it reasonable for Richard to conclude that Edward intended to be bound by his promise. It is notable that, although Edward later revoked those documents, he never informed Richard of the 1997 Will or the 2003 Will, leaving Richard unaware that Edward had retreated from his earlier promises. John also appeared to have an understanding that Edward had promised the Property to Richard, given John's questioning of Edward when he revised his plan in 1997 and John's reasoning that the 2003 Will should be hidden from Richard to avoid any problems between Edward, Richard, and Wanda.

The evidence at trial also conclusively established that Edward received some consideration in exchange for his offer, and that Richard unconditionally accepted the offer by performing his end of the agreement. The repairs and improvements for which Richard and Wanda paid were substantial, including both necessary repairs such as a new

<sup>&</sup>lt;sup>85</sup> John argues it is unreasonable to conclude that Edward provided these documents to Richard as evidence of his promise, arguing that Edward provided the document to Richard only because Richard was named as co-executor of the Estate. Were that reasoning sound, Edward also would have given John copies of the 1977 Will and the 1991 Codicil, because John was named co-executor in those documents. John testified, however, that Edward never gave John copies of those documents. The most reasonable conclusion is that Edward gave the documents to Richard, at least in part, to confirm his promise.

roof, new siding, and new windows, as well as improvements that increased the functionality and livability of the home. The fact that Richard, Wanda, and their children also enjoyed the benefit of these repairs and improvements does not diminish their value to Edward. So John also seeks to minimize the value of the improvements by arguing that Edward was not the driving force behind some items, such as the new kitchen that was built in 1995. Although that may largely be true for some of the improvements, John cannot credibly contend that Edward did not benefit from living in a home with a functioning roof, new windows, new siding, heat, or air-conditioning, or that he did not benefit from the addition of a downstairs bathroom, especially after he no longer was able to live upstairs. Edward benefited from having those improvements made to his home at no cost to him, particularly given Edward's frugal nature.

John argues, however, that the April 2000 Document shows that Richard's recollection cannot be trusted and that Edward contributed money toward the upkeep of the home and the care Richard and Wanda provided. <sup>87</sup> As an initial matter, the circumstances surrounding the creation of this document make it difficult to place any weight on its content: John appears to have been the driving force behind much of the content, the document itself was drafted by John and Linda, and John proved to be an unreliable witness. Even if everything in the document were true, however, it would not change the fact that Richard and Wanda paid for the vast majority of the repairs and

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<sup>&</sup>lt;sup>86</sup> See Shepherd v. Mazzetti, 545 A.2d 621, 623 (Del. 1988) (son's agreement to continue to manage the family business mutually benefited father and son but nonetheless served as sufficient consideration for father's promise to devise family home to son).

<sup>87</sup> JX 21.

improvements to the house, upon Edward's instruction that they should do so because he was going to devise the house to Richard.

Finally, John argues that Richard and Wanda's care of Edward and their upkeep and improvement of the house was motivated by familial obligation rather than by Richard's intent to accept Edward's offer. Although efforts by a family member to help an elderly or infirm relative raise questions as to whether the work was performed gratuitously, the substantial value of the improvements and repairs to the Property remove any doubt that Richard was motivated, at least in part, by Edward's promise to leave the Property to him and Edward's instruction that Richard should pay for the repairs and improvements because of that promise. <sup>88</sup> I need not determine whether Richard's intent to accept the promise was the primary or secondary motive for his actions, so long as I conclude it was one motivating factor. <sup>89</sup>

Richard also established by clear and convincing evidence the material terms of the oral agreement. John argues that Edward's vague statements that it "all" would be Richard's when Edward passed away are not sufficient to establish the material terms of the agreement, because Edward may have intended that Richard receive something less than a fee simple interest in the Property. As an initial matter, Edward's use of the word "all," given its plain meaning, supports a conclusion that Edward's promise was to leave the entire Property to Richard in fee simple. To the extent that evidence falls short of

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<sup>89</sup> *Id.* at \*3 n. 23.

<sup>&</sup>lt;sup>88</sup> See, e.g. Eaton v. Eaton, 2005 WL 3529110, at \*3 (Del Ch. Dec. 19, 2005) (although brothers may have been partially motivated by desire to see their father well-housed, improvements to father's home involving substantial contributions of money and labor were clearly motivated by father's promises to devise the property to brothers).

clear and convincing evidence, any doubt regarding Edward's meaning is resolved by the terms of the 1977 Will and the 1991 Codicil, which were provided to Richard and gave context to Edward's repeated promise to leave it "all" to Richard. Both of those documents devised the entire Property to Richard in fee simple.

Finally, John argues that specific performance of the oral agreement is barred by the statute of frauds, which provides:

No action shall be brought to charge the personal representatives or heirs of any deceased person upon any agreement to make a will of real or personal property, or to give a legacy or make a devise, unless such agreement is reduced to writing, or some memorandum or note thereof is signed by the person whose personal representatives or heirs are sought to be charged, or some other person lawfully authorized in writing, by the decedent, to sign for in the decedent's absence. This section shall not apply to any agreement made prior to May 1, 1933.<sup>90</sup>

John contends that Richard "offered no writing of any kind that would comply with the Statute of Frauds," and asserts that, if the Court found that the revoked 1977 Will or 1991 Codicil satisfied the writing requirement, it would "create new case law not recognized in any other jurisdiction." This argument misunderstands, or simply ignores, settled Delaware law. The Delaware Supreme Court conclusively held in *Shepherd v. Mazzetti* that clear and convincing proof of actual part performance is an exception to the statute of frauds codified in Section 2715. This Court has applied that exception several times since *Shepherd* was decided. As set forth above, Richard partially (in fact, completely)

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<sup>&</sup>lt;sup>90</sup> 6 *Del. C.* § 2715.

<sup>&</sup>lt;sup>91</sup> Resp't's Br. in Support of Exceptions to Master's Post-Trial Draft Bench Report (hereinafter "Resp't's Br.") at 17-18.

<sup>&</sup>lt;sup>92</sup> 545 A.2d 621, 622-23 (Del. 1988).

<sup>&</sup>lt;sup>93</sup> See, e.g. Eaton v. Eaton, 2005 WL 3529110, at \*4 (Del. Ch. Dec. 19, 2005); Hughes v. Frank, 1995 WL 632018, at \*4 (Del. Ch. Oct. 20, 1995).

performed the oral agreement by paying for the repairs and improvements to the Property over the course of 40 years, as Edward instructed. There is no question in this case that actual performance occurred and, under settled precedent, this Court recognizes that performance as an exception to the statute of frauds in order to prevent that statute from working an injustice.<sup>94</sup> Under the partial performance exception, there is no need for a petitioner to satisfy the writing requirement in Section 2715.

Having concluded that Richard is entitled to specific performance of the oral agreement with Edward, I need not reach most of Richard's alternate claims for relief, including his claims seeking a constructive or resulting trust over the Property. Richard also challenged the 2003 Will and the 1997 Will as invalid. Determining the validity of those wills, however, would not entitle Richard to any portion of Edward's Estate beyond the Property, and I therefore decline to reach that issue as well. Richard's claim for rescission of the 2008 Deed, however, requires resolution.

Having determined that Edward's promise to convey the Property to Richard was legally enforceable and applied to the entire Property in fee simple, it follows that the 2008 Deed must be rescinded on that basis alone, because Edward could not convey to John property that Edward contractually was bound to convey to Richard. John does not appear to challenge that conclusion, but only challenges the conclusion that the oral

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<sup>&</sup>lt;sup>94</sup> Shepherd, 545 A.2d at 623.

<sup>&</sup>lt;sup>95</sup> See, e.g., Boush v. Hodges, 1996 WL 652762, at \*8 (Del. Ch. Nov. 6, 1996) (identifying a constructive trust as an alternative remedy to ordering specific performance of an oral contract to make a will).

agreement legally was enforceable.<sup>96</sup> Because I disagree with John and recommend that the Court find that the oral agreement between Edward and Richard was valid and enforceable, I also recommend that the Court rescind the 2008 Deed on the basis of the oral agreement. I also separately conclude that the 2008 Deed should be rescinded because Edward lacked capacity at the time he signed that deed.

Although the law protects a person's right to freely transfer property, the transferor must have capacity and his decision must be free from fraud and undue influence. A grantor lacks capacity if, by reason of mental illness or defect, he is (a) unable to understand in a reasonable manner the nature and consequences of the transaction, or (b) he is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know his condition. The evidence at trial demonstrated that, by 2005, Edward's physician had opined that he was not competent to handle his own affairs. By 2008, Edward had suffered several strokes, was incontinent, and could not care for his basic needs. John offers no evidence to contradict the conclusion of Edward's doctor, which John himself procured, relying instead on vague allusions to estoppel, without the necessary analysis to support that claim.

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<sup>&</sup>lt;sup>96</sup> See Resp't's Br. at 23-24.

<sup>&</sup>lt;sup>97</sup> Mitchell v. Reynolds, 2009 WL 132881, at \*8 (Del. Ch. Jan. 6, 2009).

 <sup>&</sup>lt;sup>98</sup> Barrows v. Bowen, 1994 WL 198724, at \*4-5 (Del. Ch. May 10, 1994) (citing Restatement (Second) of Contracts § 15).
 <sup>99</sup> The doctrine of equitable estoppel is applied cautiously and only to prevent manifest injustice.

Fluv Holdings (BVI) Ltd. v. Dotomi, LLC, 2013 WL 1200273, at \*12 (Del. Ch. Mar. 26, 2013) (quoting Pilot Point Owners Ass'n v. Bonk, 2008 WL 401127, at \*2 (Del. Ch. Feb. 13, 2008)). The party invoking the doctrine must prove that (1) he lacked knowledge or the means of obtaining knowledge of the truth of the facts in question; (2) he reasonably relied on the conduct of the party against whom the estoppel is claimed; and (3) he suffered a prejudicial change of position as a result of his reliance. Waggoner v. Paster, 581 A.2d 1127, 1136 (Del. 1990). John

of the evidence supports a finding that Edward lacked capacity at the time he executed the 2008 Deed, and the Deed therefore is invalid on that independent basis. 100

#### **CONCLUSION**

For the foregoing reasons, I recommend that the Court enter an order in favor of Richard (1) requiring John, as executor of the Estate, to specifically perform Edward's portion of the oral agreement by conveying title to the Property to Richard in fee simple, and (2) rescinding the 2008 Deed. This is my final report and exceptions may be taken in accordance with Rule 144.

> /s/ Abigail M. LeGrow Master in Chancery

offered no testimony or argument regarding any of these elements, including whether he suffered a prejudicial change in position. It is not incumbent on this Court to divine a party's arguments or guess as to the facts the party believes support that argument.

<sup>&</sup>lt;sup>100</sup> See, e.g. Barrows v. Bowen, 1994 WL 198724 (Del. Ch. May 10, 1994) (deed invalid because grantor incompetent); Ryan v. Weiner, 610 A.2d 1377 (Del. Ch. 1992) (same). John also argues that Edward's capacity in 2008 should not drive the analysis, because John and Edward discussed the transfer several times over the years, and well before Edward's capacity diminished. This argument lacks persuasive force. John offered Edward no consideration for the transfer, and John does not contend he entered into a binding contract with Edward before 2008. Accordingly, Edward freely could have changed his mind at any point, and it therefore is Edward's capacity at the time the 2008 Deed was executed that governs the analysis.